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No. 86-1370

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

AUTOMATIC MUSIC AND VENDING CORPORATION,
an Ohio Corporation, and
FRATERNAL ORDER OF EAGLES,
SANFORD AERIE, #3677,

Appellants,

v

MICHIGAN LIQUOR CONTROL COMMISSION,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF MICHIGAN

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I

IS THE EXCLUSION OF A MECHANICAL DEVICE FROM A GENERAL GAMING PROHIBITION BASED ON THE NUMBER OF FREE REPLAYS ALLOWED TO ACCUMULATE ON A MACHINE AT ONE TIME, A VIOLATION OF EQUAL PROTECTION?

II

IS THE STATUTORY LANGUAGE CONTAINED IN MCL 750.303; MSA 28.535 UNCONSTITUTIONALLY VAGUE?

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MICHIGAN LIQUOR CONTROL COMMISSION,

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The Michigan Liquor Control Commission, Appellee, respectfully moves this Court to dismiss the appeal or, in the alternative, to affirm the decision of the Michigan Supreme Court because the appeal does not present a substantial federal question and because it is manifest that the questions upon which the decision of the cause depends are so unsubstantial as not to merit further argument.

STATEMENT OF THE CASE

In early 1982, officers of the Michigan Liquor Control Commission (Commission) became aware that a video draw poker machine was located on the premises of the Sanford Eagles Club. The machine was found to be of the

type prohibited under Michigan law MCL 750.303; MSA 28.535, and the regulations of the Commission, 1980 AACS, R 436.1013.

The video draw poker machine in question is activated by inserting a quarter whereupon one credit point is registered on the machine in the point column. The player then pushes the "play button" and the point column is reduced by one, and the bet column on the machine is increased by one. Next, the "deal button" is pushed and a card appears in each of five windows. The cards are dealt as if from a well-shuffled fifty-two card deck of playing cards. Depending on the cards appearing in the five windows, a player has the option of discarding any of the cards and receiving new cards. The cards are discarded by depressing the "discard button" located under the corresponding card to be discarded. The player may then receive replacement cards by depressing the corresponding "draw button" in an attempt to improve his poker hand. A hand with one pair of aces or better is necessary to win credit points/free replays. If a winning hand is dealt the player, the machine records the appropriate credit points based on the odds programmed into the machine and the number of credit points bet. The player may then play again as many times as he has credit points or, if he does not obtain a winning hand, may insert another quarter.

The video draw poker machine at the Sanford Eagles Club was designed to permit the machine to accumulate more than fifteen replays in the credit column. The machine was also equipped with a key mechanism which could be used to discharge accumulated free replays and a meter to count the number of free replays discharged.

On March 30, 1982, two inspectors from the Commission went to the Sanford Eagles Club and played the video poker machine and won 54 free games. The inspectors

asked the bartender if the games could be traded for cash. The bartender informed them that the Eagles Club did not pay off in cash, but only in free replays.

In May, 1982, the same Commission inspectors returned to the club and played the machine. After this investigation, the officers confiscated the machine as a gambling device and issued a complaint with the Commission against the Sanford Eagles Club for violating its regulation pertaining to maintaining a gambling device, 1980 AACS, R 436.1013.

A hearing was held on the complaint and a decision was made in December of 1982 finding that the machine was a game partly of skill and partly of chance and therefore an unlawful gambling device under MCL 750.303; MSA 28.535 and a violation of 1980 AACS R 436.1013.

The decision was upheld by the Commission on appeal in January, 1983. Following the Commission decision, Automatic Music and Vending Corporation (Automatic Music), who owned the machines and provided them to the Eagle's Club, applied to the Ingham County Circuit Court for an order of superintending control to review the actions of the Commission. The Ingham County Circuit court reversed the Commission and found that free replays did not constitute a reward and therefore the video draw poker machine was not a gaming device prohibited by MCL 750.303; MSA 28.535.

The Court of Appeals affirmed the order of the circuit court and held that the video machine was not a gaming device and further held that MCL 750.303(2); MSA 28.535(2) was unconstitutional on equal protection as well as vagueness grounds.

On November 24, 1986, the Michigan Supreme Court reversed the Court of Appeals finding that a free replay in fact constitutes a reward under the statute. The Court further found that MCL 750.303(2); MSA 28.535(2) does not violate equal protection guarantees nor is it so vague as to be a violation of due process. It is from this decision of the Michigan Supreme Court that Automatic Music and Vending Corporation and the Fraternal Order of Eagles, Sanford Aerie, #3677, appeals to this Court.

ARGUMENT

I

THE EXCLUSION OF A MECHANICAL DEVICE FROM A GENERAL GAMING PROHIBITION BASED ON THE NUMBER OF FREE REPLAYS ALLOWED TO ACCUMULATE ON A MACHINE AT ONE TIME, IS NOT A VIOLATION OF EQUAL PROTECTION GUARANTEES.

There is no dispute that the State has the authority to prohibit or limit gaming devices within its boundaries. (Appellants' Jurisdictional Statement, p 12). *Posadas de Puerto Rico Associates d/b/a Condado Holiday Inn* v *Tourism Company of Puerto Rico*, 478 US ___; 106 S Ct ___; 92 L Ed 2d 266, 283 (1986). The issue is whether the State may exercise that authority by excluding machines from the general gaming prohibition based, *inter alia*, on the number of free replays which may be given by a machine.

MCL 750.303(1); MSA 28.535(1), prohibits a person for hire, gain or reward from maintaining a premises where, among other things, games of skill or chance or partly of skill and partly of chance used for gaming are maintained.

An exception was created in subsection (2) to the general prohibition for a mechanical device which rewarded players through the use of an element of skill if:

1. The machine does not accumulate more than 15 replays at any one time.

2. The free replays accumulated can be discharged only by actually playing the game, and

3. The device makes no record directly or indirectly of free replays awarded.

To be excluded from the general prohibition contained in subsection (1), a machine must meet all three criteria contained in subsection (2).

There is no dispute that the video poker machine did not meet any of the three criteria necessary to be excluded from the general prohibition contained in subsection (1).

Automatic Music's only claim is that the classification of a machine based on the number of free replays is a denial of equal protection. This Court, in *Dandridge* v *Williams*, 397 US 471 (1970), found that a statute did not violate equal protection guarantees just because the classification made by a state was not made with mathematical nicety or because in practice some inequity existed. Further, the Court held that a statute making a classification would not be found to violate equal protection guarantees if any state of facts could reasonably be conceived of to justify the classification. *McGowan* v *State of Maryland*, 366 US 420, 425-427 (1961).

In *McGowan*, the Court dealt with the Maryland Sunday Closing Law. The law was in general a prohibition on all labor, business and other commercial activities on Sunday. The Court found that the statute did not violate equal

protection guarantees because the Legislature could reasonably find that the exempt items and activities were necessary for the health of the populace or for the enhancement of recreational atmosphere of the day, no evidence being in the record to the contrary.

Similarly, in the present case, the Michigan Supreme Court found that the numerical classification created by the Legislature is not unconstitutionally arbitrary, but is reasonably based on the belief that the greater the number of free replays allowed to accumulate on a machine at one time, the greater is the incentive for the owners to make cash payoffs. In the context of licensed establishments selling alcoholic beverages as in the instant case, payoffs could also be made with free drinks. Since the existence of such payoffs may be difficult to prove, and given the limited resources available to investigate claims of payoffs, the Legislature attempted to limit, and at best eliminate, such payoffs on these devices by limiting the number of free replays a machine may accumulate at any one time.

The legislature's method to limit or prohibit gambling is reasonable in light of the goal to be obtained. The statute is, therefore, entitled to a presumption of constitutionality since no evidence to the contrary is contained in the record. This Court should, therefore, dismiss the appeal or affirm the judgment of the Michigan Supreme Court since there is no substantial federal question involved or the issue needs no further argument.

II

THE STATUTORY LANGUAGE CONTAINED IN MCL 750.303; MSA 28.535, IS NOT UNCONSTITUTIONALLY VAGUE.

It is Automatic Music's claim that the language employed in the statute is so vague that it violates due proc-

ess. A reading of the statute shows that it is sufficiently clear and specific to comply with due process criteria. The standard to be used in determining whether due process is violated is whether a statute conveys a sufficiently definite warning that the conduct is illegal. *Grayned* v *City of Rockford*, 408 US 104 (1972) and *Smith* v *Goguen*, 415 US 566 (1974).

The Court in *McGowan* v *Maryland*, *supra*, was faced with a claim of vagueness where the statute exempted from the Sunday Closing Law "merchandise essential to, or customarily sold at, or incidental to the operation of" bathing beaches, or amusement parks. The Court found that business people of ordinary intelligence would be able to determine what the exception included.

MCL 750.303; MSA 28.535, provides in part that a person is guilty of a misdemeanor if that person maintains for hire, gain or reward games of skill or chance or games partly of skill and partly of chance for gaming. While the statute encompasses a wide variety of games, and may be harsh or stringent, that is insufficient basis upon which to find that the statute is vague. *Barsky* v *Board or Regents of New York*, 347 US 442, 448 (1953).

It is clear that maintaining games used for gaming/gambling[1], be they games of skill or chance or partly of skill and partly of chance, are prohibited by the statute. To gamble is readily understood to mean to play for money (cash payoff) or other stakes on the outcome of an event. *Webster's 7th New Collegiate Dictionary*, 1965.

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[1] The terms gaming and gambling under Michigan law are synonymous and used interchangeably and mean to play for a stake or prize. *People* v *Weithoff*, 51 Mich 203, 207-221; 16 NW 442 (1883).

In the instant case, a player puts 25 cents into the video draw poker machine in hopes of receiving a prize or reward of a free replay. The Michigan Supreme Court in *Oatman* v *Port Huron Chief of Police*, 310 Mich 57; 16 NW2d 665 (1944), found that a free replay was a sufficient reward to bring a game within the gaming statute. Clearly, the machine located at the Eagles Club met the criteria for a gaming device under Michigan law.

Nothing in the statute is so vague that a person of common intelligence would not be aware that a machine which gives free replays and does not fall within the exception contained in subsection (2) of the statute is illegal, subjecting the person to misdemeanor charges. The Court should therefore dismiss the appeal of Automatic Music or affirm the Michigan Supreme Court decision since there is no substantial federal question nor is the issue in need of further argument.

CONCLUSION

MCL 750.303; MSA 28.535 was enacted by the Michigan legislature as an attempt to prohibit or limit gambling within the State of Michigan. The basis used for enacting the statute is reasonable and is an appropriate method of addressing the problem of gambling devices within the State of Michigan. Further, the statute is specific and sufficiently clear in its prohibition as well as the exceptions to the prohibition so as not to be unconstitutional.

RELIEF

WHEREFORE, it is respectfully requested that this Court affirm the judgment of the Michigan Supreme Court or, in the alternative, dismiss the appeal of Automatic Music for the reason that there is a lack of a substantial federal question or, that the issue needs no further argument.

Respectfully submitted,

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